Supreme Court, U.S.
FILED
JUN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-2135

No.

IN THE
Supreme Court of the United States
October Term, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 29, 1988

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QUESTIONS PRESENTED

1. Whether a jury should be allowed, over objection, to decide an issue of foreign law?

2. Whether the District Court, even without a request, was obligated to instruct the jury on a controlling issue in the case?

LIST OF PARTIES

The following parties appeared below:

1. Islamic Republic of Iran Broadcasting, which is an agency and instrumentality of the Islamic Republic of Iran.

2. Sotheby Parke Bernet, Inc., which was initially a party below but was dismissed by consent in the District Court.

3. N.K. Behroozian, who is a citizen of Iran and a resident of France.

4. Jerry Abitbol, who is a citizen of the United States and of the State of New York.

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ISLAMIC REPUBLIC OF IRAN BROADCASTING,
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N.K. BEHROOZIAN and JERRY ABITBOL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Islamic Republic of Iran Broadcasting, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on April 1, 1988.

OPINION BELOW

The denial of the motion for rehearing is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 780. The denial of the motion and the opinion are reprinted in the appendix, hereto, pp. 1a-5a, *infra*.

The United States District Court for the District of Columbia wrote no opinion in this case. The judgment on the jury verdict is reprinted in the appendix, p. 6a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1988. IRIB petitioned timely for rehearing on March 4, 1988, and the petition was denied on April 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

Rule 44.1, F.R.C.CP.

Determination of Foreign Law

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

STATEMENT OF THE CASE

Islamic Republic of Iran Broadcasting ("IRIB") sued N.K. Behroozian and Jerry Abitbol for title to and possession of a Stradivarius violin and associated items ("the Stradivarius"), which Behroozian and Abitbol had consigned to Sotheby Parke Bernet, Inc., for auction.[1] Behroozian and Abitbol counter-

[1]The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(4).

claimed for disparagement of property and tortious interference with contract.

At trial, IRIB's evidence showed that it had bought the violin shortly before the downfall of the Shah and had never sold it in accordance with the applicable regulations to anyone. Behroozian claimed that he had bought the violin from another instrumentality of Iran, the Mostazafan Foundation ("Foundation"). Iran's legal experts, Dr. Safai and Dr. Vafai,[2] testified without expert contradiction that unless the Stradivarius was sold to the Foundation in accordance with the regulations, the Foundation had not acquired title and could not convey it.

Behroozian and Abitbol presented no evidence directly contradicting the foregoing. They did, however, present over IRIB's repeated objections, the testimony of Christian Borguet, a French attorney, as to the legal circumstances which prevailed in Iran after the revolution in early 1979. Bourguet testified that after the revolution there was no constitution, and law was "provisory." There were revolutionary courts, some self-appointed, which confiscated property and sometimes tried and executed people. Iran was "governed" by partly secret, revolutionary councils with technical decisions only made by the official governmental bodies, and above both the revolutionary councils and the official government was Imam Khomeini. Records were not kept of confiscations because "too much people [were] confiscating things all over the country." The students who took the American hostages did not act on behalf of anyone. The revolutionary council wanted the hostages released, but the students had the support of "hundreds, thousands, sometimes millions of people chanting in the street," "so the laws could not be applied." In short,

[2]Dr. Vafai was the Iranian legal specialist at the Library of Congress and the author of *Commercial Laws of the Middle East, Iran* (Oceana Publications, 1982).

he testified, as the Court of Appeals later found, that there was "an absence of law" (App. p. 4a) in Iran at the time.

The District Court instructed the jury, as IRIB requested, that the rightful owner of property could recover property not only from one guilty of an unlawful taking but also from a good faith purchaser from someone other than the owner since a thief could not pass good title. The jury nevertheless found for Behroozian and Abitbol, and the District Court entered judgment on the jury verdict (App. 6a). The Court of Appeals affirmed and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The District Court erred in allowing the jury, over objection, to decide an issue of foreign law.

A determinination of foreign law requires two steps, first, determining that the law exists and second, determining how it is to be construed. Although Rule 44.1, F.R.C.P., provides that a determination of foreign law shall be "*treated* as a ruling on a question of law" [emphasis supplied], the first step requires resolution of a question of fact, and only the second resolution of a question of law. *Eastern Bldg. & L. Asso.* v. *Williamson,* 189 U.S. 122, 126-127 (1903); *Walsh* v. *Public Service Co.,* 30 A.2d 494, 496 (N.H. 1943); *See, Crespo* v. *United States,* 399 F.2d 191, 192 (Ct.Cl. 1968); *First National City Bank* v. *Compania de Aquaceros, S.A.,* 398 F.2d 779, 782 (5th Cir. 1968); *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. 1971) (Rives, J. dissenting), *cert. den.,* 409 U.S. 1058 (1972).

Although juries are said to decide issues of fact, this is not always the case (9 Wigmore, *Evidence,* §2550, p. 640, Chadbourne rev. 1981). The District Court's determination herein

as to the existence of the law was a determination of fact, and the District Court was required to make it because Rule 44.1, F.R.C.P., as the Court of Appeals found, requires the court to make a determination of foreign law (App. p. 4a).

Although the instruction which the District Court gave the jury accepted appellant's view both as to (1) the existence and (2) the construction of Iranian law, the jury heard two views as to the existence of law. In addition to the District Court's instruction, the jury heard, despite repeated objections, Bourguet's testimony that there was no law in Iran at the time. The District Court never instructed the jury that it should disregard this testimony.

On the contrary, the District Court repeatedly instructed the jury that it was the sole judge of the facts and, on three occasions, instructed it that it should disregard all comments of the court, including "setting forth the law in these instructions," in arriving at its own findings of fact. Consistent with those instructions the jury could have decided that the law of Iran described in the District Court's instruction was merely the law on the statute books, but that law was "provisory" as Bourguet testified; in fact, there was no law. Indeed, consistent with the District Court's instructions to ignore all its comments on issues of fact, the jury *should* have ignored the court's instructions on the existence of law and considered only Bourguet's testimony because the existence of law is an issue of fact.

The District Court instructed the jury, in substance, that property improperly taken from a rightful owner could be recovered from whoever possessed it including a purchaser in good faith. If there was no law, however, a "legally" improper confiscation of the violin and transfer to the Foundation, as suggested by Bourguet's testimony, would not be im-

proper, and the rightful owner would not have a right to recover from a good faith purchaser.

Petitioner is not arguing that the jury gave improper weight to testimony in disregard of the District Court's instructions. Petitioner is aware that the jury is presumed to follow the court's instructions. The difficulty here is that a witness was improperly permitted to testify on the factual issue of the existence of law in violation of Rule 44.1, F.R.C.P. In view of the District Court's instruction that the jury was to disregard its comments on issues of fact, it cannot be fairly concluded that Bourguet's testimony that there was in fact no law did not usurp the District Court's function.

As far as undersigned counsel knows, there is no other decision from a court in the United States addressing the issue whether testimony that there is "no law" is testimony as to law within the meaning of Rule 44.1, F.R.C.P. Nevertheless, the issue is an important one, because United States courts, due to the internationalization of the American economy, are more and more frequently asked to resolve issues of foreign law where the foreign countries involved are in political turmoil. A clearly wrong Federal Circuit Court holding that testimony that there is no law is not testimony as to law will do great mischief if allowed to stand.

II. The District Court committed plain error in failing to instruct the jury regarding the Foundation's legal inability to convey good title to the Stradivarius to Behroozian.

Because IRIB's uncontradicted legal experts established that the Foundation could not transfer good title to Behroozian unless it had received the Stradivarius in accordance with the regulations, the jury should have been instructed that, even

if it found that Behroozian had purchased the violin in good faith from the Foundation, it could not find for Behroozian unless it also found that IRIB had not shown that there was no legal transfer to the Foundation. Behroozian put on no evidence showing a proper transfer from IRIB to the Foundation so IRIB's evidence was uncontradicted. A properly instructed jury would have had to find that IRIB's evidence of no legal transfer, though uncontradicted, was nevertheless insufficient to carry its burden of proof before rendering judgment in Behroozian's favor.

The jury in this case should have been so instructed even though the District Court was not requested to give such an instruction.

> It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth. The court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instruction requested is defective. [9 Wright & Miller, *Federal Practice and Procedure:* Civil §2556, at 654-655, footnotes omitted.]

Although the foregoing principle, sometimes referred to as the "plain error" rule, is in conflict with the literal language of Rule 51, F.R.C.P., which provides in pertinent part that "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection," the principle is accepted in most Circuits. *E.g., Pate* v. *Seaboard R.R., Inc.*, 819 F.2d 1074 (11th Cir. 1987); *Nowell* v. *Universal Elec.*

Co., 792 F.2d 1310 (5th Cir.), *cert. den.*, 107 S. Ct. 578 (1986); *Morris* v. *Getscher*, 708 F.2d 1306 (8th Cir. 1983); *Beardshall* v. *Minuteman Press Intern., Inc.*, 664 F.2d 23, 27 (3rd Cir. 1981); *Cohen* v. *Franchard Corporation*, 478 F.2d 115, 124 (2d Cir.), *cert. den.*, 414 U.S. 857 (1973); *see* 5A Moore's *Federal Practice*, para. 51.04, p. 51-20 and cases collected at n. 4. The principle, however, as Behroozian argued in his appellate brief, has never been accepted in the District of Columbia Circuit, *Hobson* v. *Wilson*, 737 F.2d 1, 32 n. 96 (1984), *Dellums* v. *Powell*, 566 F.2d 167, 190-191, n. 63, *cert. den.*, 438 U.S. 916 (1977), and was at least implicitly rejected by the appellate court in this case (App. 5a).

The error, we respectfully submit, was outcome determinative, because, although the jury could theoretically have found that IRIB had not carried its burden of proof concerning a legal transfer to the Foundation, this outcome was unlikely because Behroozian presented no evidence showing a legal transfer. Because a miscarriage of justice has resulted, because a foreign government is the victim of the miscarriage, and because the District of Columbia Circuit's position as to the applicability of the "plain error" rule conflicts with that of the other Circuits, this Court should grant review.

CONCLUSION

For all the reasons advanced, the petition should be granted.

Respectfully submitted,

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June 29, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7056 **September Term, 1987**

Islamic Republic of Iran Broadcasting,
a/k/a, IRIB

v.

Sotheby Parke Bernet, Inc.

BEFORE: Mikva and Williams, Circuit Judges; Myron L. Gordon, Senior Circuit Judge, U.S. Court of Appeals for the Eighth Circuit

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed March 4, 1988, it is

ORDERED, by the Court, the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
Filed Apr 01 1988
CONSTANCE L DUPRE
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 87-7056

ISLAMIC REPUBLIC OF IRAN BROADCASTING,
a/k/a, IRIB, APPELLANT
v.
SOTHEBY PARKE BERNET, INC.
v.
N.K. BEHROOZIAN, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-01371)

Argued November 19, 1987

Decided February 5, 1988

Thomas G. Corcoran, Jr., with whom *Louis E. Emery* was on the brief for appellant.

Skip Short, with whom *Jacob Dweck* was on the brief for appellees.

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON,* *Senior District Judge*.

Opinion for the Court filed by Senior District Judge GORDON.

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*Of the United States District Court for the Western District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

Islamic Republic of Iran Broadcasting v. Sotheby Parke Bernet, Inc., et al.
No. 87-7056

GORDON, Senior District Judge*: This property dispute arises out of unusual circumstances involving power struggle and property confiscation shortly after the Iranian revolution. Prior to the revolution, an agency of the Shah's government, National Iranian Radio and Television, purchased two violins and two bows from a dealer in New York, Jacques Francais. Jacques Francais eventually spotted a description of one of the violins, the Burmester Stradivarius, in an auction catalogue issued by Sotheby Parke Bernet, Inc. [Sotheby's], but the catalogue description failed to indicate that National Iranian Radio and Television had been an owner. Mr. Francais reported this deficiency to Sotheby's as well as to the Iranian delegation at the United Nations. Sotheby's subsequently withdrew the violin from its auction.

The post-revolution successor to National Iranian Radio and Television, Islamic Republic of Iran Broadcasting [IRIB], filed a complaint against Sotheby's in the district court for the District of Columbia seeking resolution of competing ownership claims. Sotheby's interpleaded the parties for whom it intended to sell the violin: N.K. Behroozian and Jerry Abitbol.

Following a jury trial, a judgment was entered in favor of the third-party defendants in the amount of $15,000 for their disparagement of property and tortious interference with contract counterclaim. The plaintiff has appealed to this court contending that a number of factual and procedural matters require reversal. Because we conclude that IRIB's arguments on appeal do not warrant divergence from the jury's disposition of this case, we affirm.

The Burmester Stradivarius was consigned to Sotheby's by Mr. Abitbol who was acting as a sales agent for N.K. Behroo-

zian. Mr. Behroozian claims to have purchased the violin in Iran shortly after the revolution at a government auction-type sale conducted by the Mostazafan Foundation [Foundation]. The Foundation was established to sell property confiscated from the Shah, his family and collaborators, and from persons who fled the country at the time of the revolution.

The jury was required to determine who lawfully owns the Burmester Stradivarius: IRIB or Mr. Behroozian and his agents. IRIB contends that the violin reached the Foundation through illegitimate means. The appellant also contends that the Foundation did not in fact engage in a practice of confiscating property from other government agencies such as National Iranian Radio and Television. The IRIB further asserts that as a matter of law the Foundation could not have transferred legitimate title. Consequently, it urges that either as a matter of fact or law, Mr. Behroozian's title to the violin should have been rejected in favor of the IRIB.

The jury's interpretation of the varied and frequently conflicting documentary evidence and testimony is entitled to great weight. Nothing that the IRIB points out persuades us that the evidence was insufficient to support the jury's verdict. Nor did Judge Bryant's rulings denying summary judgment and directed verdict, or admitting certain evidence, amount to error of such magnitude that we discern any abuse of discretion. We similarly conclude that the judge's charge to the jury was not clearly erroneous and does not warrant reversal.

The IRIB complains that in permitting a French attorney, Christian Bourguet, to testify about general policies of property confiscation prevailing in Iran when Mr. Behroozian consummated his Stradivarious purchase, the district court abdicated its responsibility to determine foreign law. While it is true that Rule 44.1, Federal Rules of Civil Procedure, provides that foreign law is to be determined by the court as a matter of law, *see also Railway Labor Executives' Ass'n v.*

United States R.R. Retirement Bd., 749 F.2d 856, 860 (D.C. Cir. 1984), our review of Mr. Bourguet's testimony persuades us that his testimony did not usurp the court's function.

Mr. Bourguet's testimony was primarily descriptive of conditions in Iran, and he was competent to tender such description. Mr. Bourguet represented the government of Iran and various of its agencies after the revolution until late 1982. He visited the country during the period relevant to this case approximately 25 times. He also met with the Revolutionary Council. Based on his personal observations of the country during this time and his experience with government officials, Mr. Bourguet described various lines of authority and viewpoints in the government. He also described the purposes and confiscation operations of the Mostazafan Foundation. It was well within the domain of the jury to consider and evaluate the credibility and relevance of his testimony with respect to these circumstances.

Mr. Bourguet did not describe Iranian law regarding the authority of the Mostazafan Foundation to transfer effective title or to confiscate property from other government agencies like the IRIB. Indeed, his testimony could be characterized as a description of the absence of law.

The law regarding the Foundation's authority to transfer good title was embodied in the jury instruction proffered by the IRIB and ultimately tendered to the jury. Having failed to object to this instruction before the jury retired to consider the case, the IRIB may not now object to Mr. Bourguet's testimony or claim that its suggested instruction was erroneous.

For the reasons set forth above, the judgment of the district court is affirmed.

United States Court of Appeals
For the District of Columbia Circuit
FILED FEB 5 1988
CONSTANCE L. DUPRE
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Islamic Republic of Iran Broadcasting	)	
	)	CIVIL NO. 82-1371
vs.	)	
Sotheby Parke Bernet	)	

JUDGMENT ON THE VERDICT
(For Defendant)

This cause having been tried by the Court and a Jury, before the Honorable William B. Bryant, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff Islamic Republic of Iran Broadcasting take nothing on the complaint against defendants N.K. Behroozian and Jerry Abitbol, and that the said defendants have and recover costs from the said plaintiff.

IT IS FURTHER ORDERED that the counter-plaintiffs-defendants N.K. Behroozian and Jerry Abitbol have and recover of and from the counter-defendant plaintiff Islamic Republic of Iran Broadcasting the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00) on the counter claim against the counter-defendant plaintiff.

Dated: 2/12/87

JAMES F. DAVEY, Clerk

By: /s/ Linda L. Romero
Linda L. Romero

RECEIVED
FEB 17 1987

FILED
FEB 12 1987
CLERK U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA